Benchnotes

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Standard for an Appointment of a Future Claims Representative

In *In re The Fairbanks Co.*,[1] the U.S. Bankruptcy Court for the Northern District of Georgia articulated the procedure for the selection and appointment of a future-claimants representative. The debtor was a small business that manufactured and distributed bronze and iron valves, which contained asbestos. When the company commenced its chapter 11 case, the goal was to obtain a channeling injunction under § 524(g) of the Bankruptcy Code and establish a trust for the benefit of claimants using third-party insurance proceeds.

Asbestos trusts typically consist of known present claimants and unknown future claimants, all of whom share in the pool for recovery. Therefore, a future-claimants representative is often appointed pursuant to motion and order in order to protect the interests of the unknown future claimants, who themselves are not at the negotiating table. In this case, the debtors filed a motion seeking the appointment of an experienced Delaware bankruptcy attorney, who had previously served in such a role with respect to five asbestos-related bankruptcy cases.[2]

The motion was met with opposition from the U.S. Trustee because it alleged that the debtor should not be the nominating party and, in any event, the debtor's particular nominee lacked independence.[3] The U.S. Trustee then nominated three additional candidates.[4] The debtor and the official committee of unsecured creditors both objected to the U.S. Trustee's candidates.[5]

The bankruptcy court began its analysis by noting that it had the authority to determine who to appoint rather than the U.S. Trustee, as it does with trustees or examiners.[6] After reviewing arguments from all parties regarding independence, knowledge, experience and efficiency, the court determined that all parties may submit nominations for a future-claimants representative, and that the court should conduct an independent inquiry on the candidates' qualifications.[7]

Next, the court focused on the standard to be applied when selecting a future-claimants representative and determined that the analysis requires greater scrutiny than "disinterestedness."[8] The court reasoned that a future-claimants representative serves as a fiduciary for the unknown claimants in negotiations and an advocate in court, in addition to being objective, experienced and fair.[9] The court also noted that a guardian *ad litem* is a close corollary because such individuals are tasked with protecting the rights of those individuals who cannot protect themselves — similar to unknown claimants in the asbestos context.[10] While a future-claimants representative cannot bind the future claimants, the plan within which the channeling injunction exists will do so.[11]

Therefore, the court concluded that standards for the appointment of a future-claimants representative are disinterested, qualified, objective, independent and an effective advocate.[12] Ultimately, the court appointed the nominee of the debtors after having investigated the arguments of the U.S. Trustee.[13]

Miscellaneous

• *In re Bassett*, 2019 Bankr. LEXIS 624 (Bankr. E.D. Cal. Feb. 26, 2019) (in analyzing vehicle valuation, court focused on whether the *prima facie* validity presumption for proofs of claim under Bankruptcy Rule 3001(f) applies to valuation of secured creditor's collateral under § 506(a) and Bankruptcy Rule 3012; court determined that better approach is to view claims allowance separate and distinct from claims valuation, including bifurcation of secured and deficiency claim values; value of collateral asserted in proof of claim provides evidence of amount of aggregate claim but is not probative on value of collateral);

• *West Salem Storage LLC v. Exide Technologies (In re Exide Technologies)*, 2019 Bankr. LEXIS 964 (Bankr. D. Del. March 28, 2019) (court ruled that purchaser of property that is subject to remediation was subject to general bar date and thus was required to file proofs of claim to avoid such claims from being discharged, even though claims arose after confirmation under either "*Grossman*" exposure test or "fair-contemplation test"; In this case, plaintiff knew that it had been exposed to product or conduct, even if no damage was suffered because environmental agencies had notified plaintiff of contamination; court rejected plaintiff's argument that it was entitled to actual notice, finding that unknown claimants at time of filing need only be provided with constructive (publication) notice);

• *In re Manhattan Jeep Chrysler Dodge Inc.*, 2019 Bankr. LEXIS 680 (Bankr. S.D.N.Y. March 4, 2019), 2019 Bankr. LEXIS 1037 (Bankr. S.D.N.Y. April 3, 2019) (in companion decisions, bankruptcy

1 *In re Fairbanks Co.*, 2019 Bankr. LEXIS 1220, at *4 (Bankr. N.D. Ga. April 17, 2019).
2 *Id.* at *5.
3 *Id.*
4 *Id.*
5 *Id.* at *5-6.
6 *Id.* at *6-7.
7 *Id.* at *13.
8 *Id.* at *15.
9 *Id.* at *16-17.
10 *Id.* at *19.
11 *Id.* at *20.
12 *Id.* at *21.
13 *Id.* at *26-27.

court determined that contingent pre-petition withdrawal-liability claim must be filed by bar date unless excusable neglect is demonstrated; first, court noted that actual withdrawal from multi-employer pension plan is not needed to give rise to potential claim for withdrawal liability; any other interpretation would eliminate contingent, unmatured or unliquidated claims from bar dates, which is contrary to intention of definition of "claim"; thereafter, court rejected pension fund's argument that withdrawal liability arises from rejection of collective-bargaining agreement; court also determined that cases publicly contemplated sale of assets that could potentially give rise to withdrawal liability, and therefore, failure to file proof of claim was not excusable);

• *Trustees of Operating Engineers Local 324 Pension Fund v. Bourdow Contracting Inc.*, 2019 U.S. App. LEXIS 8494 (6th Cir. 2019) (affirming district court decision and addressing issue of first impression and subject of circuit split, Sixth Circuit Court of Appeals conducted extensive analysis of National Labor Relations Act's alter-ego theory to determine that newly formed company that had same management, overlap in business purpose, continuity of workforce, significant similarity in customers, overlap in management and ownership interest, and evidence of intent to evade labor obligations was alter-ego of old company; no one factor was prerequisite, but balance of factors weighed in favor of such ruling; court then assessed whether *res judicata* applied and ruled that proof-of-claim and alter-ego litigation do not have identity of cause of action, and therefore litigation on amount of withdrawal liability against alter-ego was not barred);

• *In re Cousins*, Case No. 18-10739 (Bankr. E.D. La. April 10, 2019) (court concluded that claim for shared-responsibility payment (SRP) asserted against debtors was nondischargeable "tax" entitled to priority status under § 507(a)(8) of Bankruptcy Code; court determined that although Internal Revenue Code refers to SRP as penalty, under "functional analysis" test SRP assessment does not function like penalty, but rather functions as tax; lastly, court determined that SRP qualified as either excise tax or income tax, both of which are afforded priority status);

• *In re 1141 Realty Owner LLC*, 2019 WL 1270818 (Bankr. S.D.N.Y. March 18, 2019) (in granting lender's motion for summary judgment, court found that post-acceleration pre-payment provision in debtors' loan agreement was enforceable under New York law; although lender that accelerates loan following default typically forfeits right to prepayment, parties in this case specifically contracted to ensure that make-whole premium was payable even after acceleration by making premium contingent on any post-default payment and not just prepayment made after event of default (but before acceleration); moreover, it was irrelevant that pre-payment provision made no reference to acceleration);

• *In re Avaya Inc.*, 2019 WL 1750908 (Bankr. S.D.N.Y. March 28, 2019) (court denied debtor's former employee's request to redact debtor's declaration in support of its objection to former employee's pension claim; in finding that claimant failed to show his privacy interests outweighed presumption of public access to information in declaration and judicial efficiencies realized through its use, court determined that much of information that claimant sought to redact — such as his name, mailing address and telephone number — was already included in proof of claim that he voluntarily filed publicly; moreover, certain information, such as claimant's birth month and year, was critical in explaining date on which his pension benefits started to accrue, which was material to his pension claim; court found that claimant's showing lacked specificity and much of information he sought to redact was not type of information that is private or would subject him to identity theft; accordingly, court directed Avaya to file the declaration redacting only references to claimant's date of birth (but not month and year) and any additional information subject to mandatory redaction under Bankruptcy Rule 9037(a)); and

• *In re Peralta*, 2019 Bankr. LEXIS 1235 (Bankr. D.N.J. April 16, 2019) (mailing notice directly to creditor rather than such creditor's state court attorney complies with Bankruptcy Rules, even if creditor has language deficiencies; this was particularly true where, as in this case, creditor sought advice of counsel upon receipt of notice; for similar reasons, creditors were also not entitled to equitable tolling of 60-day period within which to bring nondischargeability complaint). abi